

***United States Court of Appeals
for the Second Circuit***



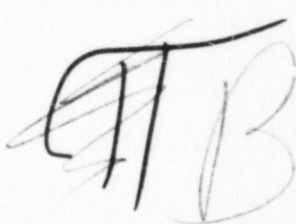
**BRIEF FOR
APPELLANT**

76-1341

To be argued by
PHYLIS SKLOOT BAMBERGER

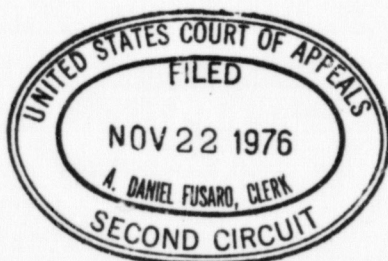
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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MARIO DeLUCIA and
:
ANGELO GERBASIO,
:
Defendants-Appellants.
:
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Docket No. 76-1341

BRIEF FOR APPELLANT
MARIO DeLUCIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



PHYLIS SKLOOT BAMBERGER,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARIO DeLUCIA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

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QUESTION PRESENTED

Whether appellant DeLucia's conviction for conspiracy charged under Count Two of the indictment must be reversed because the Government failed to prove that Angelo Gerbasio was guilty of the crimes charged.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling) rendered on July 9, 1976, convicting appellant Mario DeLucia of theft of goods in foreign commerce and conspiracy to steal and possess such goods. Appellant DeLucia was sentenced pursuant to 18 U.S.C. §3651 to a split sentence of six months in custody and 30 months on probation.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act, after trial counsel was relieved.

Statement of Facts

Appellant DeLucia and co-defendant Angelo Gerbasio were charged in count one of an indictment* with stealing a cargo of women's coats which was in foreign commerce from a Pan American cargo warehouse at Kennedy Airport. The second count of the indictment charged the two men with conspiracy to steal and to have in their possession goods stolen in foreign commerce.

*The indictment is B to the separate appendix to appellant's brief.

At the trial,* the Government called employees of Pan American Airlines and FBI agents as witnesses.

Joseph Simon was a cargo handler for Pan American World Airways at Cargo Building No. 67 at Kennedy Airport, working the 11:30 p.m. to 7:30 a.m. shift (5**). Simon testified that on October 17, 1975, while he was on a coffee break, appellant DeLucia asked him if he would like to make \$200 to \$250 helping him steal from Pan American (14). Appellant said that he would be in contact with Simon the next Wednesday, October 23, 1975, and would point out the freight he wanted to load onto a truck which he would park at door seven or eight (15-16). Simon's job would be to take the freight to the warehouse door (17).

Simon said that appellant had stated that another man would be present, but would not give the name of the other person (19).

Simon agreed to go ahead with the plan (22), but later that night, reported the plan to Jose F. Godoy, his supervisor (23, 71).

*There were pre-trial motions to suppress physical evidence and statements. There was also a pre-trial motion for severance which was denied when the court ordered redaction of the statements found to be admissible.

**Numerals in parentheses refer to pages of the transcript of the trial.

A few days later, on October 21, when Simon had heard nothing from Godoy, he reported the incident to Joe Butta, another Pan American supervisor (25).

On the following Monday, Godoy met with the Pan American security director and two FBI agents, and he told the agents what Simon had told him (74-76, 181-182). After that meeting, it was decided that the FBI would set up surveillance on the building on the night of October 22-23 (183).

Godoy testified that on the night of October 22-23, 1975, when Godoy came on duty, he reported to the FBI (78). According to Simon, on that night appellant DeLucia pointed out the freight he wanted and, at the first coffee break, Simon brought the freight over to bay eight on two carts, and appellant, with no one else present, loaded the truck (28).

Godoy testified that at about 2:00 p.m., Simon reported that appellant would take on some cargo at door nine at about 2:30 (80). Godoy called the FBI and spoke to Agent Jack Walsh (84). Walsh testified that Godoy told him that thirty cartons had been left near door nine (97) and that a Pan American truck was parked at door nine (99). Walsh notified the surveillance agents.

The surveillance had begun at midnight (124), and agents had taken up positions near the warehouse. At about 2:30 a.m., Agents Westhoff and Yoos, members of the surveillance team, saw appellant, alone, load the Pan American truck parked at door nine (127-128, 156-157). Walsh later received a telephone call from

Godoy saying that the cartons had been loaded on the truck and that the truck would be leaving soon (112). He also relayed this information to the agents maintaining surveillance at the warehouse (101, 129). Moreover, Westhoff and Yoos then saw appellant, alone in the truck, drive it from the cargo area to the south side of the building and enter the building (129, 157).

At 8:00 a.m., Westhoff and Yoos saw appellant enter the truck. For the first time, co-defendant Gerbasio appeared on the scene (145, 164). Appellant drove the truck and Gerbasio sat in the passenger seat. They drove out of the Pan American cargo area (13, 158). The truck stopped to refuel, and Agent Yoos said Gerbasio put gasoline into the truck (159).

The truck was driven through Brooklyn, over the Verrazano Bridge, to Staten Island (133), followed by FBI vehicles which forced the truck to stop. Westhoff opened the driver's door and told appellant to get out (136). Yoos arrested Gerbasio.

FBI Agent Jules opened the rear of the truck (187), compared the packages in the truck with the numbers on the ones taken from the warehouse, and concluded they were the same (188-189).

Gerbasio gave a statement to the agents in which he said that at about 8:00 a.m. he was asked to help on a truck. He did not know where the truck was going or whether it had a cargo. As a result of conversation, he believed he was going

to Staten Island for a pickup (201).*

Appellant DeLucia also gave a statement, stating that he was asked to work overtime by Chris Whelan and that he agreed to do so (206). He said he was to pick up a load on Staten Island (207).

Christie Whelan testified that on October 23 he asked appellant to work overtime, but that appellant said he could not do so because he had something to do at home (222-223). Whelan also testified that at 7:45 p.m. Gerbasio reported, in accordance with the usual procedure for those attending union meetings, that he was going to a union meeting, and Whelan gave the customary approval.

Anthony Matusa (303) testified that he assigned men in the motor pool and was Gerbasio's boss on the shift following appellant's (309). On October 23, 1975, Gerbasio had no fixed assignment (311-312), but was on standby for new matters that came up. This standby status was given because Gerbasio was a union member (318). Next to Gerbasio's name was the number "54," indicating union business (312). The business could have occurred any time during the day after 7:30 a.m. (313). However, Gerbasio got no assignment to drive to Staten Island (323).

*This was the redacted statement.

William Hudson, manager of ground transportation, testified that on the morning of October 23, 1975, at 8:00 a.m., there was to be an unscheduled meeting with union representatives to work on an inventory problem (327). Hudson said there was no memorandum of when the meeting would take place (331), that Gerbasio was not told when it would occur, and that it was held at 8:00 a.m. (332). Hudson learned that Gerbasio was not present (332).

Elmer Clinton, a local union representative, testified that he had a union meeting scheduled with Gerbasio for 10:00 or 10:30 on October 23 to discuss grievances, but that Gerbasio did not appear at the meeting (334-335).

At the conclusion of the trial, defense counsel for both defendants made motions for acquittal. The judge denied the motions, saying that as to Gerbasio the evidence was "marginal" but enough to go to the jury (351). As to appellant DeLucia, the judge found the case close on whether there was a co-conspirator under Count Two (351), but sent this question to the jury as well.

ARGUMENT

THE GOVERNMENT FAILED TO PROVE THAT
ANGELO GERBASIO WAS GUILTY OF THE
CRIMES CHARGED; ACCORDINGLY, APPEL-
LANT DeLUCIA'S CONVICTION FOR CON-
SPIRACY MUST BE VACATED.

Count Two of the indictment charged appellant DeLucia and Angelo Gerbasio with conspiracy to steal and to receive and transport goods in foreign commerce. The indictment does not allege the participation of other conspirators unknown to the grand jury, nor did the Government prove the participation of any other person. Accordingly, appellant DeLucia's guilt on Count Two is established only if Gerbasio's guilt is shown. Since the Government failed to meet its burden of proof as to Gerbasio, appellant DeLucia's conviction must be reversed. Herman v. United States, 289 F.2d 362, 368 (5th Cir. 1961); United States v. Fox, 130 F.2d 56, 57 (2d Cir.), cert. denied, 317 U.S. 666 (1942); Feder v. United States, 257 Fed. 694, 696-697 (2d Cir. 1919).

The evidence produced at trial shows that Gerbasio did not come on the scene until 8:00 a.m. on October 23, 1975, after the Pan American truck had been loaded with the cartons and parked on the south side of the parking lot. There is no evidence that prior to that time DeLucia and Gerbasio spoke with each other about the events that had occurred some six hours earlier at 2:30 that morning.

Even the reference made a week earlier, on October 17, 1975, by appellant DeLucia, that a third person would be involved, does not tie Gerbasio into the scheme. As a legal matter, the statement was not binding against Gerbasio because the Government failed to prove by a preponderance of evidence based on Gerbasio's own conduct that he was a co-conspirator. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974). Further, no specific person was named by DeLucia at that time. Since DeLucia was also vague about other parts of the plan, including the door to be used and the cargo to be involved, it is clear that the scheme was only in the planning stages and that no specific person was in mind.

The record reveals that when Gerbasio appeared on October 23, he went directly into the passenger side of the truck's cab without opening the back doors of the truck or observing what was inside. Thus, his own observations did not give him any information, and there is no evidence as to what, if anything, DeLucia told him.

Appellant DeLucia drove the truck and, according to Agent Yoos, Gerbasio got out of the truck to put gasoline into it. This act did not impart to Gerbasio any knowledge of what was in the truck or of its intended destination.

In essence, what the proof showed was mere presence in the truck, a fact not sufficient to establish the knowledge

required to show illegal taking or possession of the goods. Further, there is no proof that Gerbasio had actual possession of the goods nor that he had such control over them as to have constructive possession of them. United States v. Kearse, 444 F.2d 62 (2d Cir. 1971):

Conviction for possessing stolen goods under Section 659 requires proof of "dominion and control" over the goods in question. United States v. Casalnuovo, 350 F.2d 207, 209 (2d Cir. 1965). "Presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational, or reasonable inference that he was engaged in one of the specialized functions connected with possession ***." United States v. Romano, 382 U.S. 136, 141, 86 S.Ct. 279, 282, 15 L.Ed.2d 210 (1965).

Id., 444 F.2d at 64.

The two remaining pieces of evidence do not improve the Government's case. The first is testimony and records that Gerbasio told his supervisor that he was to attend a union meeting that morning and that he did not attend the meeting. The purpose of this evidence was to show that Gerbasio had lied about his commitments so as to provide an alibi for his whereabouts at about 8:00 a.m. and thereafter. However, the record in this case does not support any such conclusion. William Hudson, manager of ground transportation, testified that on the morning of October 23, 1975, at 8:00 a.m., there was to be an unscheduled meeting with union representatives to work on an inventory problem. Hudson said that there was no notice of when the meeting would take place, that Gerbasio

was not told when it would occur, and that the meeting was held at 8:00 a.m. Hudson later learned that Gerbasio was not present at the meeting.

Gerbasio, however, called a witness, Elmer Clinton, to testify that he had a scheduled meeting with Gerbasio between 10:00 and 10:30 a.m. Of course Gerbasio did not attend that meeting because he was by then under arrest.

Tying this together was the Government's proof that employees who attended union meetings could report that they were attending at any time, and not just immediately prior to the meeting.

Thus, the records that showed that Gerbasio was to go to a union meeting were correct. He did not know about the 8:00 meeting, so his absence from it was of no consequence. There is nothing to show that he did not plan to attend the 10:00 meeting. At most, the records show that Gerbasio was improperly getting out of work between 7:30 a.m. and the time of the 10:00 a.m. meeting.

The remaining piece of evidence was Gerbasio's post-arrest statement to the agents, introduced by the Government as a false exculpation. In the statement, Gerbasio allegedly said that he was merely asked to help on a truck* and did not know

*The original statement was that Mario had asked him. This was redacted to avoid a Bruton problem.

what was in the truck or the truck's destination.* However, this Court has held that

[f]alsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof upon which to convict where other evidence is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt.

United States v. Johnson,
513 F.2d 819, 824 (2d Cir.
1975).

See United States v. Kearse, supra. The statement made was, of course, given after the truck was stopped by three government cars with lights flashing and containing six armed agents. As in Kearse, where the defendant, who was waiting for drugs, went away from the door of an apartment filled with stolen goods when FBI agents knocked on the door, the statement here is as consistent with other explicable presence as with guilt. Indeed, the statement is perfectly consistent with the position that Gerbasio was making a trip because he had time to spare until his 10:00 a.m. union meeting with Elmer Clinton.

*The court's charge on how the jury was to consider this evidence was incorrect. The court charged that it was evidence of guilt. It is, at most, evidence of a consciousness of guilt. See, e.g., United States v. Lacey, 459 F.2d 86, 89 (2d Cir. 1972). The difference is substantial. A consciousness of guilt is the defendant's reaction to his own conduct, which may be based on conduct that is not improper. Evidence of guilt is an objective fact relating to the elements of the crime.

The record here does not show that Gerbasio had a part in loading the goods or in planning the events. Gerbasio appeared later on, and his conduct gives no indication of knowledge that stolen goods were present or of possession. Accordingly, the verdict of guilty against appellant DeLucia on Count Two of the indictment must be reversed.

CONCLUSION

For the foregoing reasons, the conviction for conspiracy charged in Count Two of the indictment against appellant DeLucia must be reversed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARIO DeLUCIA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.